Supreme Court, U.S.
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IN THE

Supreme Court of the United States

_____ Term, 19____

NO. 79-1914

ELIZABETH ANN HARBOUR,
Petitioner

v.

WILLIAM T. HARBOUR,
Respondent

On Petition For Writ of Certiorari
To The Supreme Court of Texas

RESPONDENT'S OPPOSITION TO WRIT

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The Respondent prays that a Writ of Certiorari to review the judgments of the Supreme Court of Texas entered in the above case on February 27, 1980, be denied.

OPINION BELOW

The opinion of the Court of Civil Appeals for the 14th Supreme Judicial District of the State of Texas is

reported at 590 S.W.2d 828. The Supreme Court of Texas denied Petitioner's Writ of Error citing no reversible error with no opinion.

JURISDICTION

The Respondent urges that jurisdiction is not invoked under 28 U.S.C. 1257(3), in that the Petitioner has failed to show that the validity of any statute, federal or state, has been drawn into question and has also failed to show that any title, right, privilege or immunity claimed under the Constitution or any statute of the United States has been infringed.

QUESTIONS PRESENTED

Petitioner is attempting to collaterally attack a Texas State Court's decree, as well as the bankruptcy court's determination, that a debt created in the Trial Court's decree was not dischargeable in bankruptcy. Petitioner initially filed a Bill of Discovery to determine the assets of the Respondent in an attempt to satisfy the debt created by the Trial Court's final decree. The same Trial Court which issued the decree establishing the debt reviewed its file, the bankruptcy court's action in discharging the Respondent, listened to argument of counsel, and determined that the debt created by its decree was not for maintenance and support but was in fact a division of community property and therefore dischargeable within the meaning of the Bankruptcy Act, and in fact had been discharged.

The Trial Court's decision was affirmed by the Court of Civil Appeals for the 14th Supreme Judicial District of Texas on the grounds that Petitioner had failed to prove that the debt contained elements for support and

maintenance and was therefore a simple division of community property. In so holding, the Appellate Court stated as the general rule that a debt in settlement of property is dischargeable in bankruptcy when it is not for future support and maintenance. The Texas Appellate Court followed the 5th Circuit's holding in the case of *In Re Nunnally,* 506 F.2d 1024 (5th Cir. 1975), that the substance of the debt is controlling. The Appellate Court refused to overturn the Trial Court's ruling in the absence of any additional evidence by Petitioner that the debt in question was for support and maintenance.

The Supreme Court of Texas denied the Petitioner's Application for Writ of Error, citing no reversible error in the Court of Civil Appeals' decision. The question presented to this court is:

> Whether the judgment rendered by the Court of Civil Appeals for the 14th Supreme Judicial District of Texas is correct in following the *Nunnally* rule that whether a debt created by a divorce decree is dischargeable in bankruptcy is a question of fact depending on whether the debt is a simple division of property or is instead a debt for future support and maintenance.

STATE AND FEDERAL STATUTES INVOLVED

The pertinent portions of the Bankruptcy Act, §§ 17, 17(a), 11 USC §§ 35, 35(a) as amended effective October 19, 1970, and the Texas Family Code Ann. § 3.63 (1973) are set forth in the appendix.

STATEMENT

Respondent does not agree with Petitioner's Statement of the Case. It would show the Court as follows: This is

an appeal from an order denying the Petitioner the right to discover Respondent's assets in an attempt to satisfy a judgment which had been discharged in bankruptcy. The Texas Trial Court from which the divorce decree had issued found that the debt created by the judgment was dischargeable by the bankruptcy court.

On May 11, 1972, Respondent filed a petition in bankruptcy. Petitioner was listed as an unsecured creditor with the $25,000.00 judgment in issue as the amount of her unsecured claim. Petitioner was represented in the bankruptcy proceedings by counsel and was notified of the various hearings during those proceedings, and of her right to file objections to or application for determination of the dischargability of the $25,000.00 judgment in issue. Thereafter, Petitioner was awarded and received $894.31 as her pro rata amount of the unsecured claim. In 1972 the bankruptcy court discharged the Respondent from any further liability on the debt created by the divorce decree. Petitioner made no appeal of the bankruptcy proceedings.

In 1979, Petitioner attempted to initiate discovery proceedings in an attempt to collect the discharged judgment. The Trial Court, upon request of Petitioner, reviewed its entire proceedings, as well as those of the bankruptcy court, and found that the $25,000.00 was a dischargeable debt. Petitioner has attempted to collaterally attack the Trial Court's initial judgment, as well as its present holding. The Texas Court of Civil Appeals clearly decided that Petitioner had failed to meet her burden of proving that the award was for support and maintenance rather than for a division of community property. Upon Writ of Error, the Supreme Court of the State of Texas denied Petitioner's writ citing no reversible error.

REASONS FOR DENYING WRIT

In addition to the lack of jurisdiction, the decision below should not be reviewed because there are no grounds for appeal. In effect, Petitioner is appealing from an unfavorable finding of fact. There is no conflict between the Federal Bankruptcy Act and the Texas laws regarding alimony. Texas fully accepts the rule of *Nunnally, supra,* and the Court of Civil Appeals correctly applied that rule. Petitioner has had to misstate the opinion of the Texas Court of Civil Appeals as well as misconstrue the 5th Circuit's *Nunnally* decision in order to raise a federal question.

The Texas Courts recognize the holding of *In Re Nunnally*. However, Petitioner urges that *Nunnally* stands for the proposition that all debts created between divorced spouses by court-ordered divisions of the community estate are to be non-dischargeable in bankruptcy. Respondent would show that, instead, the *Nunnally* case held that such debts *may be,* in certain cases, non-dischargeable where the division of assets is in effect for the future support and maintenance of one of the parties. "[I]t is clear [that] support in the future *can* play a significant role in the divorce court's property division and that what may appear to be a mere division of assets *may,* in fact, under a Texas divorce decree, contain a substantial amount of alimony . . ." 506 F.2d at 1027 (emphasis added).

Clearly, *Nunnally* holds that there is a factual issue in each case as to whether the payment is for support and maintenance or is simply a division of property.

We do not have a higher court attempting to interpret the factual findings contained in a trial court's decree.

In this case, the same trial court that granted the divorce decree determined that the division of property involved was not for future support and maintenance. The opinion from the Texas Court of Appeals simply refuses to overturn that finding of fact in the absence of any evidence to the contrary. Petitioner has factually failed to meet her burden of proof and has yet to produce any evidence that would show any part of the debt was for support and maintenance.

Texas citizens are not "left in a quandry", as Petitioner asserts, because the law is clear: where a divorce decree creates a debt which is for future support and maintenance, the debt is not dischargeable, but where, as here, the debt is not for support and maintenance, the debt is dischargeable.

Petitioner has failed to raise any issues of law; she is simply appealing from an unfavorable finding of fact.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent

APPENDIX A

State Statute Involved

Texas Family Code Ann. 3.63 (1970):

> In a decree of divorce or annulment the court shall order a division of the estate of the parties in a manner that the court deems just and right, having due regard for the rights of each party and any children of the marriage.

APPENDIX B

Federal Statute Involved

Bankruptcy Act 11 U.S.C. 35(a):

(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (1) are taxes which became legally due and owing by the bankrupt to the United States or to any State or any subdivision thereof within three years preceding bankruptcy: Provided, however, that a discharge in bankruptcy shall not release a bankrupt from any taxes (a) which were not assessed in any case in which the bankrupt failed to make a return required by law, (b) which were assessed within one year preceding bankruptcy in any case in which the bankrupt failed to make a return required by law, (c) which were not reported on a return made the bankrupt and which were not assessed prior to bankruptcy by reason of a prohibition on assessment pending the exhaustion of administrative or judicial remedies available to the bankrupt, (d) with respect to which the bankrupt made a false or fraudulent return, or willfully attempted in any manner to evade or defeat, or (e) which the bankrupt has collected or withheld from others as required by the laws of the United States or any State or political subdivision thereof, but has not paid over; but a discharge shall not be a bar to any remedies available under applicable law to the United States or to any State or any subdivision thereof, against the exemption of the bankrupt allowed by law and duly set apart to him under this title: And provided further, That a discharge in bankruptcy shall not release or affect any tax lien; (2) are liabilities for

obtaining money or property by false pretenses or false representation, or for obtaining money or property on credit or obtaining an extension or renewal of credit in reliance upon a materially false statement in writing respecting his financial condition made or published or caused to be made or published in any manner whatsoever with intent to deceive, or for willful and malicious conversion of the property of another; (3) have not been duly scheduled in time for proof and allowance, with the name of the creditor if known to the bankrupt, unless such creditor had notice or actual knowledge of the proceedings in bankruptcy; (4) were created by his fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity; (5) are for wages and commissions to the extent they are entitled to priority under subdivision (a) of the section 104 of this title; (6) are due for moneys of an employee received or retained by his employer to secure the faithful performance by such employee of the terms of a contract of employment; (7) are for alimony due or to become due, or for maintenance or support of wife or child, or for seduction of an unmarried female or for breach of promise of marriage accompanied by seduction, or for criminal conversation; or (8) are liabilities for willful and malicious injuries to the person or property of another other than conversion as excepted under clause (2) of this subdivision.

APPENDIX C

Affirmed, and Opinion filed November 28, 1979.

NO. A2212

ELIZABETH ANN HARBOUR, Appellant

vs.

WILLIAM T. HARBOUR, SR., Appellee

Appeal from 311th District Court
of Harris County

This is an appeal from a final order of the trial court denying a post-judgment bill of discovery on the ground that the subject judgment had been discharged in bankruptcy and was therefore no longer enforceable. We affirm.

In the March 17, 1972, decree of divorce of appellant and appellee, appellant was awarded a $25,000.00 judgment as part of the court-ordered division of the community property of the parties. On May 11, of the same year appellee filed a petition in bankruptcy in which he listed as a debt of the estate the $25,000.00 judgment. His divorced wife appeared in bankruptcy court, filed a claim for the judgment, and received a liquidating dividend of $894.31 upon his discharge from bankruptcy on July 12, 1972.

On February 23, 1979, six and one half years later, appellant filed a bill of discovery claiming that the judg-

ment was unpaid. On appellee's motion for protection, the court entered the order referred to above denying discovery and declaring the $25,000.00 judgment unenforceable.

Appellant, in her sole point of error, contends that under the rationale of *In re Nunnally,* 506 F.2d 1024 (5th Cir. 1975) the judgment debt was not a dischargeable debt within the meaning of Section 17 of the Bankruptcy Act of 1898. It is therein provided that among the debts which are not subject to discharge "are those for alimony due or to become due, or for maintentance or support of a wife. . . ." Bankruptcy Act § 17(a), 11 U.S.C. § 35(a) (1970).

Despite the Texas Supreme Court's holding in *United States v. Stelter,* 567 S.W.2d 797, 798 (Tex. Sup. 1978), that " '(a)limony' after divorce, as such, is not permitted in Texas," appellant urges that the *Nunnally* case controls the issue. There the court held that a property division may be a substitute for alimony and hence be non-dischargeable in bankruptcy. Stating that ". . . we should not be bound by the label which the state places on a decree; we must look to its substance", 506 F.2d 1024, 1027, the federal appellate court held that in that case the divorce award fell within the exception from discharge contained in Section 17.

It is interesting if not decisive, to note that the *Nunnally* case originated as an appeal of the decision of the referee in bankruptcy, while in the case at hand the bankruptcy court's decree was unchallenged for over six years prior to the institution of the discovery proceedings.

It is generally recognized "that a property settlement agreement between spouses is dischargeable in bank-

ruptcy, at least where it is truly or substantially a property agreement, and not an agreement for alimony, support or maintenance." Annot. 74 A.L.R. 2d 758 (1960). Therefore, even under *Nunnally,* when a divorced spouse asserts that the claim has—or has not—been discharged in bankruptcy the order of the divorce court must be examined to determine whether the judgment comprises solely a property division or also includes an obligation to support. *In re Smith,* 436 F. Supp. 469 (N.D. Ga. 1977). Had appellant contested the dischargability of the judgment in the bankruptcy court in 1972, she would have had the burden of proving that the $25,000.00 debt was an obligation in the nature of alimony, support or maintenance. Bankruptcy Rule 407. She should have no less burden in the district court when asserting the continued viability of a discharged judgment. She has not discharged this burden. There is nothing in the record other than the March 17, 1972, divorce decree that is evidentiary on the issue. This decree indicates clearly that the $25,000.00 judgment was an integral part of the division of the community estate of the parties. Nothing therein smacks of alimony. The trial court did not err in sustaining the motion for protection and in holding the $25,000.00 award was discharged in the bankruptcy proceedings.

Judgment of the trial court is affirmed.

/s/ George E. Miller
Associate Justice

Judgment rendered, and Opinion filed November 28, 1979.

Panel consists of Chief Justice Brown and Associate Justices Miller and Pressler.

APPENDIX D

IN THE
SUPREME COURT OF TEXAS

February 27, 1980

No. B-9125

ELIZABETH ANN HARBOUR

vs.

WILLIAM T. HARBOUR, SR.

From Harris County,
Fourteenth District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Fourteenth Supreme Judicial District having been duly considered, and the Court having determined that the application presented no error requiring reversal of the judgment of the Court of Civil Appeals, it is ordered that said application be, and hereby is, refused.